

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Docket No. 2005-0753

Edward J. Burke

Bunny's Superette, Inc., Thomas M. Burke, Marie L. Burke and Bernardine P. Donelson

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MANDATORY APPEAL FROM RULING OF THE HILLSBOROUGH COUNTY SUPERIOR  
COURT (NORTHERN DISTRICT) PURSUANT TO SUPREME COURT RULE 7

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JOINT BRIEF FOR DEFENDANTS-APPELLEES  
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## TEXT OF RELEVANT STATUTES AND CODES

### **RSA 167:14-a (V) - Recovery of Assistance**

V. All property, real or personal, in a revocable trust is subject to recovery by the department for recovery for any medical assistance provided the decedent. Upon the death of the grantor, the department shall provide the trustee with a statement containing the amount of medical assistance which was provided to the decedent.

### **RSA 498:1 - Jurisdiction**

The superior court shall have the powers of a court of equity in the following cases: Charitable uses; trusts other than express trusts as that term is defined in RSA 564-A:1; fraud, accident and mistake; the affairs of partners, joint tenants or owners and tenants in common; the redemption and foreclosure of mortgages; contribution; waste and nuisance; the specific performance of contracts; discovery; cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7.

### **RSA 547:3, I(a), (c) - Jurisdiction**

I. The probate court shall have exclusive jurisdiction over the following:

(a) The probate of wills.

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(c) The interpretation and construction of wills and the interpretation, construction, modification, and termination of trusts as that term is defined in RSA 564-A:1, I.

### **RSA 564-B:1-103(14) - Definitions**

"Revocable" as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

### **RSA 564-B:5-505(a)(1) - Creditor's Claim Against Settlor**

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

**RSA 564-B:6-604(a) - Limitation on Action Contesting Validity of Revocable Trust;  
Distribution of Trust Property**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 180 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

**564-B:8-813 - Duty to Inform and Report**

(a) Except while a trust is revocable and a settlor has capacity to revoke the trust, a trustee of a revocable trust shall provide a trustee's report comparable to that described in subsection (d) to the distributees or permissible distributees of trust income or principal.

**IRC section 676(a) – Power to Revoke**

(a) General rule: The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

**IRC section 2035(e) - Adjustments for certain gifts made within 3 years of decedent's death**

(e) Treatment of certain transfers from revocable trusts: For purposes of this section and section 2038, any transfer from any portion of a trust during any period that such portion was treated under section 676 as owned by the decedent by reason of a power in the grantor (determined without regard to section 672(e)) shall be treated as a transfer made directly by the decedent.

## STATEMENT OF THE CASE

This case arises from a dispute between the shareholders of Bunny's Superette, Inc. (hereinafter referred to as "Bunny's Superette"). The parties are members of the same family who incorporated Bunny's Superette in 1971. Defendants' Joint Appendix ("App.") at 133. Marie I. Burke is the mother of Edward J. Burke, Thomas M. Burke and Bernardine P. Donelson. App. at 133. The plaintiff, Edward Burke sought permanent injunctive relief to enjoin Marie Burke and Bernardine Donelson from transferring their shares in Bunny's Superette to Thomas Burke. App. at 1-7. Edward Burke alleged that the parties had entered into an agreement in 1971 to transfer the unincorporated grocery store owned by them (and known as Bunny's Superette) to a corporation organized in such a manner that the three children would be equally treated with respect to their parents' estates, including, but not limited to, the business, the land and building on which it was situate. App. at 1. Edward Burke further alleged that the parties had entered into a stock restriction agreement which gave him the right to purchase certain shares which were being sold, and that on April 1, 2004, both Marie Burke and Bernardine Donelson transferred their shares to Thomas Burke without affording the plaintiff the opportunity to purchase these shares. App. at 1-3.

After a two day bench trial, the superior court (Lewis, J.) issued a final order dated August 23, 2005 in which it rejected Edward Burke's claim that the parties had entered into an oral agreement in which the three children would be equally treated with respect to their parents' estates. App. at 132. The superior court also rejected Edward Burke's claim that the stock restriction prohibited a gift of stock to Thomas Burke from Marie Burke and Bernardine Donelson, and concluded that "Thomas Burke gave no money or consideration for these conveyances either to Marie (or her Trust) or Bernardine." App. at 141. Finally, the superior

court ruled that "Edward has failed to establish entitlement to any of the relief he seeks." App. at 144.

These rulings should have disposed of the entire case. However, the superior court also observed in its final order that pursuant to RSA 547:3, I(a), (c) and RSA 498:1 "it lacked jurisdiction to deal with trusts such as Marie's revocable trust, and with wills." App. at 143. The superior court therefore "decline[d] to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence." App. at 143.

Edward Burke filed a Motion to Set Aside, Modify and/or Reconsider Decree (hereinafter "Motion to Set Aside Decree") on the grounds that the court should have issued a ruling with respect to these issues because "[t]he Court tried in full all of the allegations and issues of Thomas' undue influence over Marie in the creation of and amendments to a revocable, inter vivos Trust, deed of all her real estate to the Trust, transfers of other property to the Trust, and a deed from the trust of the land and buildings on which Bunny's Superette is situated to Thomas Burke." App. at 145-148. The defendants objected to the Motion to Set Aside Decree because issues surrounding the creation and amendments to Marie Burke's estate planning documents were never properly raised before the trial court. App. at 150-151. As such, it was inconsequential that the superior court refused to issue a decision with respect to these issues. App. at 150-151.<sup>1</sup>

The superior court issued an order dated September 26, 2005 in which it denied the Motion to Set Aside Decree. App. at 160-162. The superior court also unexpectedly clarified

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<sup>1</sup> Thomas Burke also filed a supplemental objection to plaintiff's Motion to Set Aside Decree on the grounds that the trial court had already exercised jurisdiction over the inter vivos transfer of properties relating to the stock and real property from Marie Burke (through her trust) to Thomas Burke, and therefore it was implicit from the court's decision that there had been no undue influence or fraud associated with the transfer of these gifts. See App. at 154-157.



that it would not pass on any issues "that directly pertain to the trust of Marie I. Burke" and that it made no ruling regarding Edward Burke's challenge to the transfer of stock or real property from Marie Burke's revocable trust to Thomas Burke. App. at 162. The superior court further withdrew its finding that "Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernardine" because it considered this finding to extend beyond its subject matter jurisdiction. App. at 162 at n.1.

Edward Burke subsequently filed this appeal with respect to the issue whether the superior court erred in ruling that it did not have jurisdiction to resolve claims related to fraud, duress and/or undue influence of Thomas Burke in the creation of and amendments to Marie Burke's revocable trust, the transfer of Marie Burke's personal and real property to her revocable trust and the transfer of a deed to Thomas Burke for the land and buildings on which Bunny's Superette was situated. See Rule 7 Notice of Appeal. Edward Burke has since narrowed the issue on appeal by arguing that the superior court only erred in determining that it did not have jurisdiction to consider the transfer of property to and from a revocable trust, and he has acknowledged that the probate court is vested with exclusive jurisdiction to consider the creation and amendments of a trust. See Plaintiff's Brief at 5.

The defendants agree with Edward Burke's statement of the law. The defendants disagree with Edward Burke's request for the case to be remanded to the superior court "with instructions to further remand for trial in the Probate Court on the petition now pending."<sup>2</sup>

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<sup>2</sup> Edward Burke filed a "protective action" at the Hillsborough County Probate Court for the purpose of reserving the right to raise claims relating to fraud, duress and/or undue influence of Thomas Burke in the creation of Marie Burke's revocable trust, deeds of real estate to the trust, and a deed of trust of land and buildings on which Bunny's Superette is situated to Thomas Burke. App. at 163-164. The defendants objected to the petition on the grounds that Edward Burke failed to state a claim for relief, and that those issues were not properly raised at the superior court. App. at 165-166. The Probate Court (Cloutier, J.) informed the parties at a recent structuring conference that it would stay the action until a decision was issued by this Court. Edward Burke now asks that this case be "remanded" by superior court to the probate court. Plaintiff's Brief at 13. It is believed that the appropriate

Plaintiff's Brief at 13. The superior court should be required to issue a determination with respect to Edward Burke's claims pertaining to the transfer of property to and from Marie Burke's revocable trust. The defendants have already incurred considerable expense by being forced to defend against Edward Burke's lawsuit in superior court, and they should not be forced to defend against an unnecessary second proceeding relating to the same transfers in probate court.

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terminology is for the case to be "transferred" to the probate court, and more importantly the defendants disagree that such a transfer would be necessary or appropriate.

## STATEMENT OF FACTS

### **A.     Bunny's Superette**

Marie and Bernard Burke first established a grocery store called Bunny's Superette in the early 1950's. App. at 135. During their childhood and early adulthood, all of the Burke children worked at the business on a full time and/or part time basis. App. at 135-136. Bernardine Donelson and Thomas Burke went to college, but Edward Burke chose to continue to live at home and to work at the business after high school. App. at 135-136. Thomas Burke eventually returned to work at Bunny's Superette and Bernardine Donelson chose to pursue a career in real estate. App. at 136. Bunny's Superette was considered a family business, however there was never any dispute that Marie and Bernard Burke were the legal owners of the business. App. at 136-137.

In 1970, Bernard Burke became ill and died on May 12, 1971. App. at 137. Bernard Burke's will provided that one dollar would be given to each of his children, and that Marie Burke would receive the remainder of his estate. App. at 137. As the surviving joint tenant, Marie Burke became the sole owner of Bunny's Superette and the properties which had been purchased during their marriage. App. at 137-138. In 1971, Marie Burke decided to incorporate Bunny's Superette and gifted a 25% interest in the business to each of her children. App. at 138. As part of the incorporation process, the parties also entered into an agreement to adopt a written stock restriction which provides that:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the 'agreed price' . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holders and said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder

shall be free to sell said stock to any other party, which party shall take subject to this restriction.

App. at 139. This stock restriction only prevented the sale of stock, and the parties were free to gift their stock to one another. App. at 139.

After Bernard Burke passed away, Edward Burke and Thomas Burke managed Bunny's Superette until 1996. App. at 139. Over the years, Edward Burke's relationship with his family deteriorated. App. at 140. In 1996, Edward Burke left the business to work at a competing grocery business which was owned by his son. App. at 140. Edward Burke has been estranged from his family since that time. App. at 140. He no longer visits them, he does not correspond with them and he does not talk to them at social and/or family events. App. at 141. Marie Burke has never met Edward Burke's grandchildren. App. at 141.

In 1999, Marie Burke created a revocable trust which provided for the distribution of her estate at her death. App. at 141. Marie Burke transferred her real estate and her stock in Bunny's Superette to her trust thereafter. App. at 141. In March of 2004, Marie Burke, as the Trustee of the Marie I. Burke Revocable Trust, gifted the real estate associated with Bunny's Superette to Thomas Burke. App. at 141. In April of 2004, Marie Burke and Bernardine Donelson also gifted their shares in Bunny's Superette to Thomas Burke. App. at 141, 143. At that time, Marie Burke also amended her trust to change the gifts to each of her three children. App. at 141-142.<sup>3</sup> There is no evidence that Thomas Burke gave any consideration to Marie Burke or to Bernardine Donelson in exchange for the stock. App. at 141, 143. Marie Burke is a private person, and prior to this litigation she had never shared copies of these documents with her children. Tr. 6/16 at 44-45, 92, 174-76.

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<sup>3</sup> Marie Burke later amended her trust to remove her gift to Edward Burke after he commenced this litigation. Transcript ("Tr.") 6/16 at 93-94.

## **B. The Litigation**

Edward Burke initiated this action by filing a Petition for Injunction in which he sought monetary damages as well as permanent injunctive relief to enjoin Marie Burke and Bernardine Donelson from transferring their shares in Bunny's Superette to Thomas Burke. App. at 1-26. Edward Burke alleged that he was verbally promised by his father that he was a co-owner of Bunny's Superette, and that someday he would inherit the business, land and building associated with Bunny's Superette. App. at 1. Edward Burke also alleged that the parties entered into an agreement which contained a stock restriction that gave him the right to purchase certain shares which were being sold, and that on April 1, 2004 both Marie Burke and Bernardine Donelson improperly transferred their shares to Thomas Burke without affording Edward Burke the opportunity to purchase these shares. App. at 1-3.

Shortly before trial, Edward Burke suddenly and unexpectedly attempted to inject aspects of fraud, duress and undue influence relating to the transfer of property from Marie Burke's revocable trust to Thomas Burke into the litigation. Edward Burke issued a Subpoena Duces Tecum on May 23, 2005 in which he ordered Marie Burke to appear for a deposition in which she would be required to bring "[c]opies of all wills executed by you during your lifetime, the original of your current will, and the original of all trust documents executed by you during your lifetime." App. at 35. The defendants objected to the Subpoena Duces Tecum on the grounds that the case only involved the issue whether Marie Burke and Bernardine Donelson violated a stock restriction (or other agreement) by transferring shares to Thomas Burke, and therefore Marie Burke's wills and trusts had no bearing upon the pending matter. App. at 32-35. The superior court allowed this discovery despite the defendants' objections, and Marie Burke was

forced to produce her private (and previously confidential) estate planning documents. App. at 36.

Edward Burke also issued a Subpoena Duces Tecum just two days before trial in which he requested a significant number of documents pertaining to Marie Burke's estate planning and finances. App. at 45-51. On June 14, 2005, on the eve of trial, the superior court held a hearing on the plaintiff's Ex Parte Motion to Quash Subpoena Seeking Production of Documents during which Edward Burke's counsel explained that he needed this information for the purpose of exploring Thomas Burke's involvement with Marie Burke's financial affairs. App. at 42-43. The defendants objected to the production of documents because the request was untimely and the documents were not relevant.<sup>4</sup> The superior court nonetheless allowed Edward Burke to conduct limited discovery to the extent that the documents could be relevant. Edward Burke never sought to amend his complaint to include any claims relating to fraud, duress and/or undue influence after receiving these additional documents.

The trial commenced on June 15, 2005. The focus of the trial was whether Edward Burke was verbally promised by his parents that he was a co-owner of Bunny's Superette, and that someday he would inherit the business, land and building associated with Bunny's Superette. Tr. 6/15 at 6, 20. The defendants testified that they were never promised an ownership interest and/or future inheritance if they continued to work at Bunny's Superette. See Tr. 6/16 at 55, 116-117, 179-81. The defendants also testified that there was never an agreement with respect to who would ultimately own and/or inherit the store. See id.

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<sup>4</sup> Edward Burke never requested a transcript of this hearing, but nonetheless has referenced isolated portions of the proceeding to support his argument that he properly raised the issue of undue influence, duress or fraud. See Objection to Motion to Strike. The plaintiff has not set forth a sufficient record on appeal to support a determination that he made this request. What is more, the defendants have listened to the tape recording and disagree with Edward Burke's representation that these issues were properly raised during this hearing.

During the trial, there was also some testimony regarding Marie Burke's wills and trusts. The defendants objected to the introduction of this evidence for the purpose of contesting her estate, and the court explained that Edward Burke would be allowed leeway to introduce this evidence but would eventually need to "make it clear" what remedy he was seeking. Tr. 6/15 at 44-66. It appeared that Edward Burke was introducing this evidence mainly for the purpose of determining whether the transfer of real property from Marie Burke to Thomas Burke violated the alleged verbal agreement, as well as to show whether the transfer of stock from Marie Burke to Thomas Burke was actually a gift. Tr. 6/15 at 95, 119-21, 132, 135-37; Tr. 6/16 at 50-51, 58, 67-100, 183. Edward Burke attempted to argue that Bernardine Donelson would receive additional inheritance from Marie Burke in return for the conveyance of her stock in Bunny's Superette to Thomas Burke. Tr. 6/16 at 88-93; App. at 88-89, 143.

After trial, the superior court allowed the parties to submit a post-trial memorandum. See App. at 60, 96, 114. In his post-trial memorandum, Edward Burke challenged for the very first time the creation of Marie Burke's estate planning documents on the grounds that she was incompetent when they were created. App. at 72-79, 84-87. Edward Burke also requested the court to set aside and/or reform the wills and trusts as a result of fraud, duress and/or undue influence. App. at 91. The defendants objected to Edward Burke's request for relief because these issues were not properly raised prior to trial, and had no bearing on the issues before the court. See App. at 117. The defendants also objected on the grounds that there was insufficient evidence to support such a ruling.<sup>5</sup> App. at 117-119.

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<sup>5</sup> Marie Burke testified that she met Attorney Ruth Ansell in private to prepare and modify her estate documents, as well as that she never discussed her estate planning documents with Thomas Burke because she is a private person and "it's none of their business, you know." Tr. 6/16 at 44. Marie Burke also testified that she took Edward Burke out of her trust because "[h]e and his family don't visit me. I'm a great grandmother three times. I wasn't told by them. We're not even friends now." Tr. 6/16 at 49. There was no evidence which would support a determination that Marie Burke's decision to leave no gift to Edward Burke was the result of undue influence, fraud or duress.

The superior court ultimately issued a final order which rejected Edward Burke's claim that the parties had entered into an oral agreement in which the three children would be equally treated with respect to their parent's estates. App. at 10. The superior court also rejected Edward Burke's claim that the stock restriction prohibited a gift of stock to Thomas Burke from Marie Burke and Bernardine Donelson. App. at 139. The superior court also found that "Thomas Burke gave no money or consideration for these conveyances either to Marie (or her Trust) or Bernardine." App. at 141, 143. In light of these rulings, the superior court determined that "Edward has failed to establish entitlement to any of the relief he seeks." App. at 144.

This case is now on appeal because the superior court eventually determined in a post-trial order that it had no jurisdiction to consider any issues relating to Marie Burke's revocable trust, and therefore withdrew its determination that the conveyance of property from Marie Burke's revocable trust to Thomas Burke was a gift. App. at 162. The superior court also determined that it did not have jurisdiction to consider whether (1) Marie Burke's transfer of property to Thomas Burke was the result of undue influence, fraud or duress or (2) the creation and modification of Marie Burke's trust and will was the result of undue influence, fraud or duress. App. at 162. This appeal followed.



### SUMMARY OF THE ARGUMENT

The superior court erred by determining that it did not have jurisdiction to consider issues surrounding the inter vivos transfer of property from Marie Burke to Thomas Burke. The superior court has jurisdiction to issue a decision with respect to the transfer of property to and from an inter vivos revocable trust because these transfers do not involve the "creation, modification or termination of a trust." RSA 547:3, I(c). As the settlor and sole trustee of the inter vivos revocable trust, Marie Burke retained an unrestricted right to convey property into and from the trust. A determination of whether the transfer of stock from Marie Burke to Thomas Burke was a gift (or the result of undue influence, fraud or duress) does not involve an issue which falls within the exclusive jurisdiction of the probate court. As such, the superior court had jurisdiction to consider all issues surrounding the transfer of property from Marie Burke's trust to Thomas Burke.

This case should be remanded to the superior court for reinstatement of its finding that the transfer of stock from Marie Burke to Thomas Burke was a gift. Edward Burke failed to properly raise the issue regarding whether the transfer of stock and other real estate was the result of undue influence, fraud or duress, and therefore this particular issue does not need to be remanded to the superior court. Nonetheless, this issue should also be remanded to superior court in the event that this Court determines that Edward Burke properly raised this issue.

The defendants disagree with Edward Burke's request that the case be remanded to the superior court "with instructions to further remand for trial in the Probate Court on the petition now pending." Plaintiff's Brief at 13. The superior court should resolve all issues concerning the transfer of property from Marie Burke's trust to Thomas Burke, and there are no additional issues which need to be decided in probate court. Edward Burke should not be permitted to

transform this case into a will contest by have it transferred to the probate court for a determination whether the changes to the estate planning documents were the result of undue influence, fraud or duress.

## ARGUMENT

### **I. The Superior Court Improperly Determined That It Did Not Have Jurisdiction To Resolve Any Issues Surrounding The Transfer Of Property To Or From Marie Burke's Revocable Trust**

#### **A. Standard of Review**

The determination whether a probate court has subject matter jurisdiction is a question of law. See In re Page's Estate, 117 N.H. 734, 734 (1977) (explaining that issue of probate court's subject matter jurisdiction was a question of law). The superior court's determination that it lacked subject matter jurisdiction to consider the transfer of property to and from Marie Burke's revocable trust must be reviewed de novo. See State v. Pierce, 152 N.H. 790, 791 (2005) (explaining that issues of law are reviewed de novo).

#### **B. The Superior Court Had Jurisdiction To Consider All Issues Surrounding The Transfer Of Property To And From Marie Burke's Revocable Trust**

The defendants do not dispute that the superior court had jurisdiction to consider issues relating to the transfer of property from Marie Burke's revocable trust. The superior court had jurisdiction over inter vivos transfers relating to the stock and real property from Marie Burke (through her trust) to Thomas Burke. These transfers were within the superior court's jurisdiction because they do not involve "the interpretation, construction, modification, [or] termination" of a trust. See RSA 547:3, I(c). These issues instead involve the enforceability of inter vivos transfers which happened to pertain to property that had been placed in a revocable trust. Indeed, there are other cases in which the superior court has ruled on issues pertaining to property which happened to be in a revocable trust. See e.g., Pope v. Lee, 152 N.H. 296 (2005) (superior court interpreted lease agreement for property which was owned by revocable trust); Walsh v. Young, 139 N.H. 693 (1995) (superior court considered request for constructive trust over funds which were currently being held in revocable trust). There is nothing in the statute

which provides the probate court exclusive jurisdiction over these issues. Based on the foregoing, the superior court had jurisdiction to consider any and all issues relating to the transfer of property to Thomas Burke from Marie Burke's revocable trust.<sup>6</sup>

There is identity of interest between Marie Burke individually and as the sole settlor and current trustee of her revocable trust. Marie Burke has unlimited power over the property held in her revocable trust. A revocable trust is defined in the Uniform Trust Code as "a trust [which is] revocable by the settlor without the consent of the trustee or a person holding an adverse interest." RSA 564-B:1-103(14) (2004). Essentially, the settlor of the revocable trust can do anything that she wants with the trust assets. As a result of her unrestricted power, Marie Burke's revocable trust reports all income on her social security number during her lifetime. See IRC section 676(a). Gifts from her revocable trust are treated as gifts from Marie Burke during her lifetime. See IRC section 2035(e). The property of her revocable trust is subject to the claims of her creditors. See RSA 564-B:5-505(a); see also RSA 167:14-a (V) (Recovery of Assistance). Similarly, the beneficiaries of a revocable trust are not entitled to notice of either the existence of the trust or any actions of the trustees while the settlor has the capacity to revoke the trust. See RSA 564-B:8-813.

1. Whether The Conveyance of Stock Was A Gift Or Sale

The superior court erroneously withdrew its finding that the transfer of stock from Marie Burke to Thomas Burke was a gift. There is no reason that the superior court does not have subject matter jurisdiction to consider this issue, and the mere fact that the stock was once in a revocable trust has no affect on the superior court's ability to issue a determination. See Galdjie v. Darwish, 7 Cal. Rptr. 3d 178 (2d Dist. 2003) (explaining that where the trust was a revocable

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<sup>6</sup> In fact, the determination of issues surrounding the transfer of real property and stock from Marie Burke to Thomas Burke is no different than the determination that Bernardine Donelson gifted her stock to Thomas Burke. It would not make procedural sense to require two separate trials on these issues.

inter vivos trust, the trustees had the power during their lifetimes to direct the sale of the real property owned by the trust). This issue was the centerpiece of the trial, and the superior court has a complete record of this issue. The superior court should be ordered to reinstate its finding that the conveyance of Bunny's Superette stock from Marie Burke's revocable trust to Thomas Burke was a gift. There is no reason that this particular issue should be transferred to probate court.

2. Whether The Conveyance of Real Property And Stock Was The Result Of Undue Influence, Fraud Or Duress

Edward Burke also states in his brief that the superior court has jurisdiction to consider issues relating to fraud, duress and undue influence with respect to the transfer of property from Marie Burke's revocable trust to Thomas Burke. The defendants agree with Edward Burke's statement of law that the superior court has jurisdiction over these issues. The defendants disagree, however, that the superior court committed an error by failing to address these issues because they were never properly raised.

Edward Burke did not allege any facts in his petition to support a determination that the transfer of property to Thomas Burke was the result of fraud, duress or undue influence, nor did Edward Burke ever seek to amend his petition to include such a claim. App. at 1-7. Edward Burke only first discussed this issue on the eve of trial when he stated that he wanted to review Marie Burke's financial and estate planning documents for the purpose of exploring the amount of control that Thomas Burke exercised over her financial affairs. After receiving these documents, Edward Burke never amended his petition. Edward Burke instead attempted to raise the issue of undue influence, fraud or duress in the Requests for Findings of Facts and Rulings of Law, which was submitted after discovery had closed and after the trial begun. App. at 52.

It is well settled that a party has a right to be informed of the theory on which the plaintiffs are proceeding and the redress that he claims as a result of the defendant's actions. See Kravitz v. Beech Hill Hosp., L.L.C., 148 N.H. 383, 392 (2002). Edward Burke never sought to amend his pleadings, and only first attempted to raise the issue of undue influence, fraud or duress in his Requests for Findings of Facts and Rulings of Law. App. at 52. Edward Burke was not entitled to allege such a claim for the very first time in these requests (which were filed after the trial began). The introduction of issues pertaining to fraud, duress and undue influence suddenly and unexpectedly injected aspects of Marie Burke's mental capacity into a case that was expected to only involve issues pertaining to Edward Burke's claim that he was improperly denied an opportunity to purchase shares because of an oral agreement between the parties and/or the stock restriction.<sup>7</sup>

Even assuming that the issues of undue influence, fraud and duress with respect to the transfer of property from Marie Burke to Thomas Burke were properly raised, Edward Burke is not entitled to have the case transferred to probate court. Edward Burke has already forced his family (including his eighty-seven year old mother) to withstand lengthy depositions and trial examination. The superior court allowed Edward Burke extraordinary freedom to introduce evidence regarding the transfer of property from Marie Burke to Thomas Burke, and there is no dispute that he had an adequate opportunity to introduce evidence on the issues of undue influence, fraud and duress. Tr. 6/15 at 44-66.

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<sup>7</sup> Edward Burke argued in his Objection to Motion to Strike that the defendants waived their objection to claims of fraud, duress and undue influence by failing to object to testimony pertaining to Marie Burke's wills and trusts. The defendants did object to the introduction of this evidence, but the superior court allowed the testimony. Tr. 6/15 at 44. What is more, the apparent purpose of this testimony was to determine whether the transfer of real property from Marie Burke to Thomas Burke violated the alleged verbal agreement, as well as to show whether the transfer of stock from Marie Burke to Thomas Burke was actually a gift. During trial, Edward Burke attempted to prove that Bernardine Donelson would receive additional inheritance from Marie Burke in return for the conveyance of her stock in Bunny's Superette to Thomas Burke. Tr. 6/16 at 88-93, 174-78.; App. at 143.

The only apparent reason that Edward Burke desires to have the case transferred to probate court is because the evidence was simply insufficient to establish that Marie Burke was under any undue influence, fraud or duress when she transferred property to Thomas Burke. Marie Burke and Thomas Burke testified that Thomas Burke was never present when these documents were discussed or signed because "it wasn't any of his business." Tr. 6/16 at 43-46; 83-85, 92-99. Marie Burke also testified that she understood which gifts she was planning to give her three children, and that she eventually chose not to make any gifts to Edward Burke because "he and his family don't visit me. I'm a great grandmother three times. I wasn't told by them. We're not even friends now." Tr. 6/16 at 48-49. Marie Burke also testified that she gave her stock to Thomas Burke because "I knew darned well that if I didn't do it now and I died, there'd be an awful lot of trouble. So I wanted to prove that I gave it to him. . . ." Tr. 6/16 at 50. Marie Burke's testimony indicated that understood her estate plan (notwithstanding her current age, the passage of time since these documents were signed, and the difficulty of discussing these private issues in the midst of an emotionally difficult trial brought by her eldest child). Tr. 6/16 at 44-50. In the end, Edward Burke failed to set forth sufficient evidence to challenge the validity of Marie Burke's transfer of property to Thomas Burke.

Edward Burke should not be permitted to obtain a "second bite at the apple" to the extent that he was not satisfied with the evidence which was introduced at trial. Edward Burke had the heavy burden of proving fraud, duress and undue influence with respect to the transfer of properties, and he had ample opportunity to perform discovery and introduce evidence on this issue. See Salisbury v. Lowe, 140 N.H. 82, 83 (1995); Patey v. Peaslee, 101 N.H. 26, 30 (1957). The record is now complete, and the superior court is in the best position to determine whether the transfer of property from Marie Burke to Thomas Burke resulted from undue influence, fraud

or duress. The defendants have already been forced to spend a significant amount of time, money and emotional energy defending this lawsuit. Edward Burke should not be permitted to subject his family to additional court proceedings on issues which should have been properly raised and explored during the superior court trial.

3. Whether The First And Second Amendments To Marie Burke's Trust Was The Result Of Undue Influence, Fraud Or Duress

It is noteworthy that Edward Burke is also requesting that the case be transferred to probate court in order to conserve judicial resources because he plans to pursue his claim that the creation and modification of Marie Burke's trust documents were also the result of fraud, duress or undue influence. Edward Burke is not entitled to pursue such a probate proceeding because this issue has no bearing on the litigation, as well as because this issue is not ripe. Marie Burke is still alive and has not been found to be incompetent to handle her own affairs. There is no dispute that her trust is revocable and subject to change at any time until her death or incapacity. She is in control of all trust property, both equitably and legally. A challenge to the validity of her revocable trust may be commenced after her death within the earlier of three years or one hundred and eighty days after notice under RSA 564-B:6-604. Clearly, since Marie Burke' trust is still revocable, the time for bringing a challenge to the validity of her trust has not yet started.

CONCLUSION

The superior court erred by determining that it did not have jurisdiction to consider issues surrounding the inter vivos transfer of property from Marie Burke's revocable trust to Thomas Burke. The case should be remanded to superior court for reinstatement of its finding that the transfer of stock from Marie Burke to Thomas Burke was a gift. This Court should also hold that issues of undue influence, fraud or duress with respect to the transfer of property from Marie Burke to Thomas Burke were not properly raised, or alternatively remand the case to superior



court for a determination based upon the record. This Court should decline to issue an order that the case should be transferred to probate court.

**REQUEST FOR ORAL ARGUMENT**

Pursuant to New Hampshire Supreme Court Rule 16 (10) (2), the defendants request that oral argument be scheduled in this matter. Oral argument will be presented on behalf of defendants by Danielle Pacik and Ruth Ansell. The defendants estimate oral argument to be 15 minutes.

Respectfully submitted,

**THOMAS M. BURKE**

By his attorneys,

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Dated: May 4, 2006

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**CERTIFICATE OF SERVICE**

I hereby certify on this 4th day of May 2006, two copies of the brief and appendix were mailed to Vincent A. Wengers, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc.

A handwritten signature in black ink, appearing to read "Dall L R", written over a horizontal line.

Danielle Pacik, Esquire

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